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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of TIMOTHY and FREDERIQUE WESSELMAN.	
TIMOTHY WESSELMAN, Appellant, v. FREDERIQUE WESSELMAN, Respondent.	D072468 (Super. Ct. No. D547627)

APPEAL from a judgment of the Superior Court of San Diego County, Paula S. Rosenstein, Judge. Affirmed.

Timothy Wesselman, in pro. per., for Appellant.

Frederique Wesselman, in pro. per., for Respondent.

After eight days of trial spread over the course of one year, the family court entered a judgment dissolving the marriage and dividing the property of Timothy Wesselman (Husband) and Frederique Wesselman (Wife). Husband appeals the judgment in three main respects. First, he contends the family court erred by sanctioning

him for violating the automatic family court restraining orders after he withdrew $300,000 from a predominantly community property retirement account. Second, he contends the family court erred in its treatment of the primary marital residence. Specifically, he challenges the court's rulings denying his request to charge Wife for the postseparation period during which she possessed the residence nearly exclusively, requiring the community (rather than Wife) to pay property tax arrearages incurred during that period, and awarding Wife full reimbursement for her separate property contributions toward the acquisition of the residence. Third, Husband contends the court erred by ordering only a limited retroactive modification of his spousal and child support obligations.

Wife did not file a respondent's brief, but did appear for oral argument.

We conclude Husband's challenges lack merit. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Husband and Wife met in 2000 in Paris, France, where Wife lived and Husband had been traveling somewhat regularly. Wife moved to the United States in 2001 to marry Husband; they married on May 22, 2002. They had three children during the marriage: a daughter born in 2003, a son born in 2005, and a daughter born in 2008.

Husband holds a bachelor's degree in mechanical engineering, two certificates in finance and accounting, and one certificate in strategic marketing. He worked for HP (or related companies) for about 17 years, and earned an annual salary of approximately $215,000 in 2013. In September 2013, Husband incorporated a startup company (the

Startup) and left HP to pursue the opportunity. Although the marital community contributed some funds to the Startup, Wife was not otherwise involved in the business.

Wife obtained a bachelor's degree in accounting and a two-year degree in tourism while in France. She never used her accounting degree in the United States, and instead worked only part-time jobs. Once the couple had children, Wife worked primarily as their caregiver. She earned some income from working part-time and from a rental apartment she owned in France. The children's private school also gave a credit against the children's tuition for time Wife spent working at the school.

In January 2014, about four months after Husband began the Startup, Husband and Wife separated. The following month, Husband filed a petition for dissolution. In preliminary support proceedings, Husband advised the court he anticipated earning an annual salary of $100,000 from the Startup. The family court ordered Husband to pay spousal and child support totaling $2,978 ($2,253 for child support; $725 for spousal support).

Trial began in December 2015. Husband and Wife were each represented by counsel, and each presented testimony and documentary evidence over the course of eight court days. On December 8, 2016—nearly one year after the first day of trial—the court spent about an hour and a half orally announcing its intended ruling. The parties each requested a statement of decision. After addressing certain procedural issues, the court issued its final statement of decision on March 9, 2017, and entered judgment on April 19, 2017.

Husband appeals.

DISCUSSION

I. *Appellate Principles*

"It is a fundamental rule of appellate review that a judgment is presumed correct and the appealing party must affirmatively show error." (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1484; see *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) Accordingly, if the judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning. (*Estate of Beard* (1999) 71 Cal.App.4th 753, 776-777; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.) Even when, as here, no respondent's brief is filed, the appellant still bears the burden of showing prejudicial error. (See *Lee v. Wells Fargo Bank, N.A.* (2001) 88 Cal.App.4th 1187, 1192, fn. 7; Cal. Rules of Court, rule 8.220(a)(2).)[1]

An appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record." (Rule 8.204(a)(2)(C).) "An appellant has the duty to summarize the facts fairly in light of the judgment, and such duty ' "grows with the complexity of the record." ' " (*Jones & Matson v. Hall* (2007) 155 Cal.App.4th 1596, 1607.) Appellate briefs also " ' "must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' " [Citation.] "We are not bound to develop appellants' arguments for them." ' " (*In re Marriage of Brandes* (2015) 239 Cal.App.4th 1461, 1481 (*Brandes*).)

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1 Further rule references are to the California Rules of Court.

An appellant also has the burden to provide an adequate record from which to show the lower court erred. (*Denham, supra*, 2 Cal.3d at p. 564; *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 494; *Amato v. Mercury Casualty Co*. (1993) 18 Cal.App.4th 1784, 1794.) "We cannot presume error from an incomplete record." (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1412.) " '[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc*. (2002) 99 Cal.App.4th 1412, 1416 (*Gee*); see *Aguilar v. Avis Rent A Car System, Inc*. (1999) 21 Cal.4th 121, 132 (*Aguilar*).)

These appellate principles apply with equal force to an appellant who is not represented by counsel on appeal. (See *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125-1126.).)

II. *Sanctions for Violating Automatic Temporary Restraining Orders*

Upon filing and service of the petition for dissolution and related summons, Husband and Wife became subject to an automatic temporary restraining order (ATRO) that limited their ability to transfer, conceal, or dispose of assets. (Fam. Code,[2] §§ 233, subd. (a), 2040, subd. (a)(2); see *In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090, 1102 (*McTiernan*).) The family court found Husband violated this ATRO when he made a tax-free withdrawal of $300,000 from a predominantly

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2 Further statutory references are to the Family Code unless otherwise indicated.

community property retirement account and invested the funds in the Startup through his 401(k) there. Because Husband was in substantial arrears on his support obligations when he did this, the court ordered that Wife also be allowed to withdraw $50,000 from the community retirement account to meet her current living expenses. As a sanction for Husband's willful violation of the ATRO, the court ordered that he bear any tax consequences resulting from Wife's withdrawal. Husband contends this sanction award was improper. We disagree.

A. *Background*

Husband's support arrears and ATRO violation came up throughout trial.

On the first day of trial (December 14, 2015), Husband admitted he was about $20,000 in arrears on child and spousal support. The Startup generated no revenue in 2014, and $200,000 in revenue in 2015, but "ha[d] run out of funds." Despite anticipating an annual salary of $100,000 from the Startup, Husband earned a total of $58,000 between September 2014 and the start of trial. He was attempting to meet his personal expenses with his limited earnings from the Startup and consulting work, savings, credit card debt, and assistance from his fiancée.

At the end of the first day of trial, Husband's lawyer asked, in "an exercise of caution," whether the ATROs remain in effect. The court responded, "The ATROs do remain in effect . . . until we finish this trial and a ruling is issued." The court continued the trial until March 21, 2016.

On the second day of trial, Husband acknowledged he was aware the ATROs were still in effect, but he had in the meantime transferred $300,000 from a retirement account

without Wife's consent. Husband and Wife had an individual retirement account with Fidelity (the Fidelity IRA) that had a balance of approximately $670,000 at the start of trial. Because Husband had some separate property funds (about $19,000) in the account at the time of marriage, the parties stipulated to appointment of an expert to apportion the balance between separate property and community property.[3] But Husband admitted that in January 2015—before the apportionment calculation was completed and only a few weeks after the court had reiterated that the ATROs were still in effect—he transferred $300,000 from the Fidelity IRA to his 401(k) at the Startup.[4] He, in turn, invested the 401(k) funds in shares of the Startup, thus infusing the company with additional funds. The Startup used the new funds to pay employees and other expenses, but paid Husband only one month's salary. Husband acknowledged he did not meet his child or spousal support obligations during this period, paying just $1,500 toward a nearly $12,000 obligation.

Husband attempted to justify the transfer by explaining "it was less than half [of the account balance] and it was an emergency" because the Startup "was down to the last month" due to limited funds. He argued his transfer of the funds caused no harm to Wife or the community estate because his active and exclusive management of the account, during the marriage and after separation, helped minimize losses when "the market

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[3] In October 2016, the appointed expert determined Husband had an 11.9 percent separate property interest in the account.

[4] Because Husband transferred the funds from one retirement account to another, the transfer triggered no adverse tax consequences.

crashed," and eventually grew the principal over time. Despite Husband's explanations, he admitted that when his lawyer learned of the transfer, the lawyer sent a letter to Wife's lawyer acknowledging that the transfer violated the ATROs and that counsel had so advised Husband.

Wife testified she was unable to meet her and the children's ongoing expenses without Husband's financial support. Consequently, at the end of the second day of trial, she asked the court to order Husband to pay her $50,000 from the Startup's bank account, which had been infused with the $300,000 transfer.

The court expressed frustration that Husband appeared to be putting the Startup's interests ahead of his children's interests and his obligation to comply with court orders.[5] The court also observed that Husband had a financial advantage over Wife because he could access the Fidelity IRA's funds tax-free, whereas she could not.[6] Ultimately, the court denied Wife's request due to "potential problems" with ordering Husband to transfer

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5 Specifically, the court stated: "He's not paying. He's not following court orders. He's not following the ATROs, he's not following the support orders. [¶] . . . [¶] . . . He's making his company the priority and not his children. He's taking the money out and using it for his company, which he's now been trying to make succeed for over three years, I think. . . . [¶] . . . [¶] [I]n the meantime, his children are not being supported. [¶] . . . [¶] Now, you might argue that [his support obligation] should be reduced . . . . But to simply not pay it or to pay $500 here and there is not acceptable. Not when he takes $300,000 out of an account and puts it into his company. He makes that choice to put it into his company."

6 The court explained: "[I]f she had used it, she would have had to pay taxes on it because she would have had to take it out as opposed to him rolling it over into his company using it how he wants there, choosing not to take a paycheck and instead—and not paying support for her and the three children."

funds residing in the Startup's bank account. The court continued the trial to April 14, 2016.

As of the third day of trial, Husband had fallen farther in arrears on his support obligations. Wife testified she was exhausting her separate property funds on living expenses, and she and the children were living a "very restricted" lifestyle. At the end of the day, Wife appealed to "the mercy of the Court" for "any sort of monetary relief that can be awarded" to defray legal and living expenses "so she's not bled dry" during the protracted trial. Wife noted the Fidelity IRA still had available funds, but a withdrawal for her benefit would carry tax consequences. She also noted the Startup's bank account still had $184,000.

The court found it "appalling" that Husband "violated the ATROs" and continued to "place[] his company's importance over his children's importance," leaving them "high and dry." It "appear[ed]" to the court that Husband was "choosing not to take a salary" from the Startup "so he doesn't [have to] pay" spousal and child support. However, the court ultimately denied Wife's request, again expressing concern about ordering a transfer of funds held in the Startup's account. The court continued trial to May 2.

At the outset of the fourth day of trial, the court and the parties discussed two items that had been filed in the interim (neither of which are in the appellate record). First, the court filed an order appointing an expert to assess the Startup's finances, particularly in light of Husband's transfer of funds from the Fidelity IRA. Second, the parties filed points and authorities addressing whether the court could order a transfer of funds from the Startup's account. The court deferred the matter to the end of the day.

At the end of the day, Wife argued Husband's points and authorities "doubled down" on his position that the Startup's needs come before his children's. Wife viewed the fact that Husband authorized the Startup to make payroll payments to its employees other than Husband as "a massive red flag" that "what he's doing" is "intentional." The court agreed that Husband "is 100 percent in control" of the Startup, "so it's up to him whether he pays himself a salary." Husband explained he had not taken a salary from the Startup because he viewed the Startup's success in "the long run" as being in the children's best interests. The court responded that, after three years with limited success, the Startup was "running out of the long run." The court stated it was "getting increasingly frustrated because" the "children are being left high and dry" while Husband continues to put his company first. Ultimately, the court announced it would wait to hear from the appointed expert regarding the Startup's finances before ruling on Wife's request.

On the fifth day of trial (June 30, 2016), the court announced it would wait until the end of trial to rule on Wife's request arising from Husband's ATRO's violation.

At the outset of the sixth day of trial (August 22, 2016), Wife informed the court that Husband had not provided the business-evaluation expert with all the requested materials. Wife also advised that the $300,000 transferred to the Startup had dwindled to $53,000. Wife proposed that the court order Husband to pay her from one of three sources: funds in the Startup's bank account; the Fidelity IRA (with Husband "to pay the taxes and penalties on that"); or sale proceeds from one of the two residences acquired during the marriage. Wife testified Husband paid no support in June, July, or August,

and Wife had fallen three months behind on her mortgage. Husband objected that he should not incur the tax consequences of Wife's withdrawal from the Fidelity IRA because he had not incurred any tax consequences from his $300,000 transfer. The court responded, "Yes, because [Husband] was able to do a sleight of hand to move that money. [¶] . . . [¶] . . . He rolled it over [in]to his company into a tax-protected status. [¶] . . . [¶] And then he took the money and used that to buy stock and he never had any tax consequences. Well, [Wife] doesn't have that same opportunity to avoid those tax consequences. So why should he get his half of the money tax free and she should have to pay all of the taxes?" Husband explained he was still "working very, very hard" to build the company so he could start earning "a proper salary." The court responded, "Where is the evidence of it? Paying support is the only evidence I want to see on it. Leaving his children high and dry is unacceptable and I said that in every hearing. Putting the company first is unacceptable in every hearing and I have said that." The court deferred ruling on Wife's request until the following day.

At the end of the seventh day of trial (August 23), the court granted Wife's request and ordered that $50,000 be distributed from the Fidelity IRA to Wife for her use in meeting her living expenses. The court reserved jurisdiction over "characterization of that money" and "the issue of who will be paying the taxes." Husband then asked for a $50,000 advance from the Fidelity IRA, arguing his "liquidity issues are just as bad as [Wife's]." Wife objected, arguing "the whole reason the Court has granted the $50,000 as a predistribution [to Wife] is because of other issues with [Husband] in this case, not as a benevolent order . . . ." The court agreed with Wife and denied Husband's request.

On October 13, 2016, the court entered a stipulated order confirming the expert's apportionment of the Fidelity IRA as 11.9 percent Husband's property, and 88.1 percent community property. The stipulation indicated the $50,000 withdrawal for Wife "will be charged against [her] interest in the account."

On the eighth day of trial, the court delivered its oral ruling on Wife's request, which the court later memorialized in the statement of decision and the judgment. The court found Husband intentionally violated the ATROs, as evidenced by the fact he withdrew $300,000 from the Fidelity IRA shortly after he confirmed with the court that the ATROs were still in effect. The court was not persuaded by Husband's "altruistic assertions that he transferred the money to save the company[,] which would, in turn, help the family." Instead, the court noted the withdrawal allowed Husband to make a tax-free infusion of funds into his company, which Husband used to pay employees and other business expenses. Meanwhile, Husband "continuously failed to pay either his current support orders or his accrued arrearages." The court found "the transfer of funds was not in the usual course of business and it was not for the necessities of life." Under these circumstances, the court concluded Husband's intentional violation of the ATROs "warrants a penalty" in the form of Husband bearing any tax consequences of Wife's withdrawal from the Fidelity IRA.

In addition, based on Husband's intentional violation of the ATROs, his dilatory conduct with the expert who was apportioning the Fidelity IRA, and his conduct with regard to one of the marital residences (the Silver Crest Residence, discussed in part

III.A., *post*), the court also ordered Husband to pay a $25,000 sanction to Wife under section 271.[7]

B. *Relevant Legal Principles*

Upon filing and service of a petition for dissolution and related summons, the parties become subject to certain ATROs, one of which restrains "both parties from transferring . . . or in any way disposing of any property . . . without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life . . . ." (§§ 2040, subd. (a)(2), 233, subd. (a); see *McTiernan*, *supra*, 133 Cal.App.4th at p. 1102.) The ATROs remain "in effect against the parties until the final judgment is entered or the petition is dismissed, or until further order of the court." (§ 233, subd. (a).)

We generally review the factual underpinnings of a sanction award for substantial evidence, and the decision whether to impose sanctions for an abuse of discretion. (See *In re Marriage of Pearson* (2018) 21 Cal.App.5th 218, 233 [§ 271 sanctions].) Husband requests "a de novo review," but cites no authority indicating this is the appropriate

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7 Section 271, subdivision (a) states: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

standard of review. Accordingly, we apply the substantial-evidence and abuse-of-discretion standards of review as appropriate.

C. *Analysis*

Substantial evidence supports the trial court's findings that Husband intentionally violated the ATROs and that none of the exceptions applied. (§ 2040, subd. (a)(2).) On the first day of trial in December 2015, Husband's counsel confirmed with the court that the ATROs were still in effect. Husband was present and later acknowledged he had heard the court's admonition. Yet, just a few weeks later, Husband knowingly transferred $300,000 from the Fidelity IRA to his 401(k) at the Startup. This clearly constitutes "transferring . . . property" within the meaning of the ATROs. (§ 2040, subd. (a)(2).)

Husband does not contend Wife consented to the transaction. (§ 2040, subd. (a)(2) [restraining transfers "without the written consent of the other party"].) Indeed, he acknowledged at trial that he made the transfer without Wife's consent.

Nor does Husband contend the court authorized the transfer. (§ 2040, subd. (a)(2) [restraining transfers "without . . . an order of the court"].) To the contrary, the court stated the ATROs would remain in effect until the court issued its final ruling. In addition, the court repeatedly expressed its disapproval and frustration with Husband having made the transfer without consent or court approval.

Husband contends the transfer was made in the usual course of business because he had always actively managed the Fidelity IRA's investments. We are not persuaded. First, the courts have rejected such an exception. (See *McTiernan, supra*, 133 Cal.App.4th at p. 1103, fn. 9 ["[W]e cannot accept husband's contention . . . that the

'usual course' exception applied because he had always managed the community property. Such a construction would nullify the plain purpose of the statutory restraining order."].) Second, even if such an exception theoretically existed, it would not apply here. Husband testified he made the transfer due to "an emergency" with the Startup's finances. Third, we are unconvinced by Husband's suggestion that his use of the withdrawn funds to purchase stock in the Startup—over which he exercised exclusive control—"is in no way different than the [purchase] of shares of Tesla or Qualcomm that [H]usband was actively trading on a daily basis within [the] Fidelity IRA."

Finally, substantial evidence supports the finding that Husband did not transfer the funds to provide for his "necessities of life." (§ 2040, subd. (a)(2).) To the contrary, Husband testified he used the funds primarily for business expenses, including *other employees'* salaries. Indeed, the family court observed Husband was "choosing not to take a salary" from the Startup.

Thus, substantial evidence supports the factual underpinnings of the family court's conclusion that Husband violated the ATROs.

As for the family court's decision to sanction Husband and the manner in which to do so, we find no abuse of discretion. Husband knowingly violated the ATROs within weeks of having confirmed they were still in effect. He then used the funds for the benefit of his company, instead of paying himself a salary so he could comply with his court-ordered support obligations.

The form of the sanction—requiring Husband to bear the potential tax consequences of Wife's early withdrawal of $50,000 from the Fidelity IRA—was within

the court's discretion. (The advance, itself, was not part of the sanction because it was charged against Wife's interest in the account.) The court explained during trial that this form of sanction would be reasonable because Husband was able to use "sleight of hand" to withdraw $300,000 from the Fidelity IRA without tax consequences, while Wife "doesn't have that same opportunity to avoid those tax consequences."[8]

Husband maintains the sanction was unauthorized because it "resulted in an unequal division of the IRA" in violation of section 2550, which requires the court to "divide the community estate of the parties equally."[9] As noted, however, the court *did* divide the *principal* of the Fidelity IRA equally—the $50,000 advance to Wife was charged against her interest in the account, and the balance of the account was equally divided by stipulation. Neither of the cases Husband cites in his opening brief address whether the family court must consider amounts paid by a party as court-ordered sanctions when equally dividing the community estate. (See *In re Marriage of Cooper*

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8 As noted in our summary of the factual background, the family court made this observation in response to Husband's objection to Wife's request on the sixth day of trial that Husband bear the consequences of an early withdrawal from the Fidelity IRA. The court considered the issue again on the seventh day of trial, before finally ruling on the eighth day of trial. Thus, we find unpersuasive Husband's assertion during oral argument that he "was never given the opportunity to respond or be heard on the matter."

9 Section 2550 states: "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally."

(2008) 160 Cal.App.4th 574, 579-580 [retirement benefits]; *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 87-89 [determining value of assets].)

Husband claims the amount of the sanction is unreasonable because it increased his overall tax liability and "bumped up his entire tax bracket." However, the appellate record is devoid of any evidence supporting this contention. (See *Gee, supra,* 99 Cal.App.4th at p. 1416 [" '[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' "]; *Aguilar, supra,* 21 Cal.4th at p. 132.) Husband informally requests in his opening brief that we take judicial notice of the legal consequences of his tax filings. We deny the request because these are not matters subject to judicial notice, and the request is procedurally improper. (See Evid. Code §§ 451 [mandatory judicial notice], 452 [permissive judicial notice]; rule 8.252(a)(1) ["To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order."]; *Ortega v. Contra Costa Community College Dist.* (2007) 156 Cal.App.4th 1073, 1086, fn. 9 (*Ortega*) [denying "on procedural grounds" a request for judicial notice set forth in the appellant's opening brief].)

Husband also claims the family court implicitly acknowledged that the amount of the sanction was unreasonable because the court noted that the $25,000 sanction imposed on Husband under section 271 "more than covered" the attorney fees Wife incurred "directly related" to Husband's ATRO violation. However, the section 271 sanction addressed *attorney fees*; the ATRO-violation sanction addressed the potentially disparate *tax consequences* resulting from Wife's $50,000 withdrawal from the Fidelity IRA

compared to Husband's admittedly tax-free $300,000 withdrawal. The family court did not err in imposing separate sanctions that addressed separate consequences.

Finally, Husband argues the sanctions are unwarranted because he always observed his fiduciary duty as manager of the Fidelity IRA—he never withdrew more than half of the balance, and his active management of the account minimized losses and grew the principal. However, Husband's claim of compliance with his fiduciary duties is belied by his withdrawal of $300,000 in knowing violation of the ATROs.

III. *Challenges Regarding the Primary Marital Residence*

Husband challenges several of the family court's rulings regarding the primary marital residence. Specifically, he claims the court erred by (1) denying his request to impose *Watts*[10] charges on Wife for the postseparation period during which she nearly exclusively occupied the residence; (2) requiring the community (rather than Wife) to pay property tax arrears incurred during that period; and (3) awarding Wife full reimbursement under section 2640 for separate property funds she contributed toward the acquisition of the residence. These challenges lack merit.

A. *Background*

Husband and Wife purchased two residences in San Diego during the marriage. In 2007, they purchased a residence on Silver Crest Lane (the Silver Crest Residence). The family lived in this residence until 2012, when Husband and Wife purchased a residence on Murano Lane (the Murano Residence) for $1.37 million.

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10 *In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 374 (*Watts*).

After moving into the Murano Residence, Husband and Wife leased the Silver Crest Residence to tenants. Rental income from the property exceeded monthly expenses by about $500-600. Husband managed the rental finances.

As noted, Husband and Wife separated in January 2014. About three months later, on March 9, Husband moved out of the Murano Residence. Wife changed the locks the next day. With minor exceptions, she enjoyed exclusive use of the residence from then until trial.

For a period of time after moving out, Husband lived in a residence in Santa Luz and would not disclose his address to Wife. During this time, he retained the rental surplus from the Silver Crest Residence and did not share it with Wife. In March 2015, the tenants moved out, and Husband and his fiancée moved in. Husband did not obtain Wife's consent before doing so. Husband paid the mortgage on the Silver Crest Residence, and his fiancée helped with living expenses.

Husband, as noted, became substantially in arrears on his support obligations. After exhausting her separate property, Wife fell several months behind on mortgage and property tax payments for the Murano Residence.

In May 2014, Husband and Wife agreed to sell the Murano Residence. However, due to disputes over which realtor to use and Wife's claim for reimbursement for her separate property contribution toward its acquisition, the residence still had not been sold as of trial two years later. The parties estimated the fair market value of the Murano Residence (approximately $1.5 million) exceeded its outstanding mortgage balance (approximately $500,000) by about $1 million.

B. *Denial of* Watts *Charges*

1. *Family Court's Ruling*

Husband asked the family court to assess *Watts* charges against Wife of approximately $3,700 per month for each month during which she enjoyed exclusive possession of the Murano Residence. The trial court denied Husband's request, with the following explanation in the statement of decision:

> "[Husband] was not regularly paying the court[-]ordered child support or spousal support of almost $3[,]000 per month. [Wife] was forced to use her separate property funds to support the parties' three children and pay the costs of maintaining the home[,] all of which limited her options to leave the home. The court has also considered [Husband]'s unilateral decision to remove the tenants from the Silver Crest [Residence] so that he could live there and his 'unclean hands' based on his voluntary violation of the ATRO[s]. . . . Having taken into account all the circumstances relevant to [Wife]'s exclusive use of the community residence, the court finds that it would be unfair or unreasonable to assess *Watts* charges and, therefore, denies [Husband]'s request."

2. *Relevant Legal Principles*

" 'Where one spouse has the exclusive use of a community asset during the period between separation and trial, that spouse may be required to compensate the community for the reasonable value of that use.' [Citation.] The right to such compensation is commonly known as a '*Watts* charge.' [Citation.] Where the *Watts* rule applies, the court is 'obligated either to order reimbursement to the community or to offer an explanation for not doing so.' " (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 978; see *Watts, supra*, 171 Cal.App.3d at p. 374.) A court considering whether to assess a *Watts* charge must "take[] into account all the circumstances under which exclusive

possession [of the community property asset] was ordered." (*Watts*, at p. 374; see *Falcone*, at p. 979.) We review that decision for abuse of discretion. (*In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1272.)[11]

3. *Analysis*

We find no abuse of discretion in the family court's denial of Husband's request to assess *Watts* charges against Wife. As the lower court noted, it was primarily *Husband's* ongoing failure to meet his court-ordered support obligations that limited Wife's housing options. The court was entitled to reject Husband's claim (repeated on appeal) that "he was trying his best to meet the support obligations." Indeed, the court consistently found that Husband prioritized the success of the Startup over his court-ordered financial obligations to Wife and their children. It was not an abuse of discretion to prevent Husband from obtaining a financial advantage by consistently violating court orders.

C. *Satisfying Property Tax Arrears From the Community Estate*

The family court ordered that when the Murano Residence is eventually sold, the community's sale proceeds must first be used to satisfy the property tax arrears on the property before the remaining proceeds are distributed to Husband and Wife. Husband contends this ruling is in error because (1) the court's oral ruling provided that the taxes would be satisfied from Wife's half of the proceeds, and (2) the taxes were incurred while Wife enjoyed the exclusive use of the property. Neither contention is persuasive.

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11 Husband cites no authority to support his "request for a **de novo review**" of the family court's ruling. Accordingly, we will apply the abuse-of-discretion standard.

First, although the family court initially stated orally that "[p]ast-due property taxes will be paid out of Wife's portion" of the sale proceeds, the statement of decision and judgment unequivocally state the tax arrears must be satisfied from the community's proceeds. "An oral ruling followed by a written statement of decision makes the initial ruling nothing more than a tentative decision . . . ." (*Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1173, fn. 4.) " '[A] court is not bound by its statement of intended decision and may enter a wholly different judgment than that announced.' " (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646; rule 3.1590(b) ["The tentative decision does not constitute a judgment and is not binding on the court. If the court subsequently modifies or changes its announced tentative decision, the clerk must serve a copy of the modification or change on all parties that appeared at the trial."].) Accordingly, the family court was free to change its tentative decision, and it clearly did so in the statement of decision and the judgment.[12]

Second, Husband's claim that Wife should be responsible for the property taxes because she had exclusive possession of the property when the taxes were incurred is

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12 Husband acknowledges he failed to timely object to Wife's proposed judgment, which the family court apparently adopted. (See rule 3.1590(j) ["Any party may, within 10 days after service of the proposed judgment, serve and file objections thereto."].) He asks us "to take judicial notice that during this same time he was in a period of grieving for a loss and attending multiple hospital appointments surrounding a personal matter with a child from his current marriage and had unintentionally delayed this process with good cause." We deny the request because these are not matters subject to judicial notice, and the request is procedurally improper. (See Evid. Code §§ 451 [mandatory judicial notice], 452 [permissive judicial notice]; rule 8.252(a)(1) [request for judicial notice must be made by separate motion with a proposed order]; *Ortega*, *supra*, 156 Cal.App.4th at p. 1086, fn. 9 [same].)

merely a rehash of his argument regarding *Watts* assessments. We find the argument no more persuasive in the context of property taxes.

D. *Tracing Wife's Separate Property Contribution to the Murano Residence*

Husband challenges the sufficiency of the evidence supporting the family court's order awarding Wife the entire amount of her alleged separate property contribution (approximately $523,600) toward the purchase and improvement of the Murano Residence. (See *In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1057-1058 ["Whether the spouse claiming a separate property interest has adequately met his or her burden of tracing to a separate property source is a question of fact and the trial court's holding on the matter must be upheld if supported by substantial evidence."].) Substantial evidence supports the court's finding.

1. *Additional Background*

Wife inherited two apartments in France upon her mother's death in 2003. Wife later sold the apartments and deposited the sale proceeds in bank accounts in France.[13] Wife testified these separate property accounts were never commingled with community funds.

Wife transferred some of her separate property funds into community bank accounts in the U.S. during and shortly after the purchase of the Murano Residence. The parties discussed that "the money transferred from France" was Wife's "inheritance," and

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13 The sale proceeds were Wife's separate property. (See § 770, subd. (a)(2) ["Separate property of a married person includes all of the following: [¶] . . . [¶] [a]ll property acquired by the person after marriage by gift, bequest, devise, or descent."].)

they "will use it to purchase Murano." Without Wife's separate property contributions, the parties would not have been able to purchase the house.

The parties closed escrow on the Murano Residence in May 2012 at a purchase price of $1,370,000, plus $15,418.52 in closing costs. They made a total downpayment of $495,000 in three separate transactions. The first installment of $20,000 came from a community checking account on March 15. The second installment of $270,000 came from a joint brokerage account on April 30. The third installment of $205,000 came from a joint checking account on May 3.

On March 29, during the period the parties were making these downpayments, Wife transferred approximately $155,255 of her separate property funds from a French bank into the community bank account from which they made the third downpayment about a month later.

The purchase transaction was consummated with a first mortgage of $546,250 and a home equity line of credit (HELOC) of $339,852.52 ($328,750 of which was principal).

In August, about two months after the close of escrow, Wife transferred $368,345 from her separate property French bank account into a community checking account. The next day, the parties made a payment of $340,318.15 from this joint account to pay off the total HELOC balance. Wife testified the parties used at least $28,000 of her separate property funds to "redo the wood, paint, and . . . floors" of the Murano Residence.

At trial, wife sought reimbursement of the full $523,600 she had transferred from her French separate property bank accounts ($155,255 during the downpayment period,

and $368,345 the day before the HELOC payoff). Husband countered that Wife was not entitled to *any* reimbursement because all the funds had been commingled. Alternatively, he argued the most she would be entitled to recover was $484,005, consisting of (1) $155,255 from the downpayment, and (2) $328,750 for the principal component of the HELOC payoff. He argued she was not entitled to the remaining $39,595 from her second transfer of French separate property funds because these funds went toward interest on the HELOC and furnishings for the house, which are not reimbursable.

The family court found Wife was entitled to recover the full $523,600 she had transferred from her French separate property bank account. The court found the "evidence . . . showed that the intended purpose of the transferred funds was to purchase the parties['] marital residence on Murano Avenue, to pay off the HELOC incurred at the time of purchase and related reimbursable expenses on the residence." The court further found "the evidence confirmed that [Wife]'s separate property funds were, in fact, used for their intended purpose. . . ."[14] Finally, the court found that although Wife's separate property funds were "briefly commingled in the joint bank account, [Wife] traced the funds back to her separate property bank account . . . ." The court rejected "[Husband]'s assertion that . . . some of [Wife]'s separate property funds were used to pay non-reimbursable expenses . . . ."

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14 In the statement of decision, the family court cited specific trial exhibits, and indicated it had reviewed the parties' bank statements.

2. *Relevant Legal Principles*

Section 2640, subdivision (b) states in part: "In the division of the community estate . . . , unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source."

Subdivision (a) limits the scope of reimbursable funds to " '[c]ontributions to the acquisition of property,' " which "include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property."

" 'Commingling of separate and community property does not alter the status of the separate property interest so long as it can be traced to its separate property source. [Citation.]' " (*In re Marriage of Bonvino* (2015) 241 Cal.App.4th 1411, 1423.) "Virtually any credible evidence may be used to" trace a separate property interest in a community asset. (*Ibid*.)

" 'Whether the spouse claiming a separate property interest has adequately traced an asset to a separate property source is a question of fact for the trial court, and its finding must be upheld if supported by substantial evidence.' " (*Brandes*, *supra*, 239 Cal.App.4th at p. 1484.)

3. *Analysis*

Husband has not met his burden of showing that insufficient evidence supports the family court's finding that Wife adequately traced $523,600 of reimbursable contributions toward the Murano Residence to a separate property source. The appellate record affirmatively accounts for $512,005 ($155,255 downpayment, $328,750 HELOC principal, and $28,000 for improvements), and Husband has not shown that trial exhibits omitted from the appellate record do not account for the remainder.

First, Husband and Wife testified she transferred approximately $155,255 of her separate property funds from a bank account in France into the community bank account from which they made the third downpayment. (See § 2640, subd. (a) [" 'Contributions to the acquisition of property . . . ' . . . include downpayments"].) Although those funds were briefly commingled with community funds, Wife testified that she and Husband discussed the fact that her separate property would be used to acquire the Murano Residence, the purchase of which would not have been possible without her separate property. The family court could reasonably infer that the parties intended that their downpayment from the joint account first exhaust all of Wife's separate property in the joint account before accessing the additional community funds.

Second, Husband and Wife also testified that the day after Wife transferred $368,345 from her separate property bank account in France into a community checking account, they paid off the HELOC from this community account. The HELOC then had an outstanding principal balance of $328,750, which is reimbursable. (See § 2640, subd.

(a) [" 'Contributions to the acquisition of property . . . ' . . . include . . . payments that reduce the principal of a loan used to finance the purchase . . . of the property"].)

Finally, Wife testified that the parties used the remainder of her separate property funds—at least $28,000—to improve the Murano Residence (paint, flooring, and woodwork). (See § 2640, subd. (a) [" 'Contributions to the acquisition of property . . . ' . . . include . . . payments for improvements"].)

Together, the downpayment ($155,255), HELOC principal payoff ($328,750), and improvements (at least $28,000) total $512,005 of Wife's reimbursable separate property. This leaves approximately $11,595 of Wife's transferred funds not directly accounted for. However, the family court found Wife's claims were substantiated by banking records admitted as trial exhibits. Husband did not include these exhibits in the appellate record, and thus has not met his burden of showing the family court's findings are not adequately supported. (See *Gee*, *supra*, 99 Cal.App.4th at p. 1416; *Aguilar*, *supra*, 21 Cal.4th at p. 132.)

Husband contends Wife is not entitled to reimbursement of all of her separate property funds because the couple used about $13,000 of the funds to buy teak furniture, which is not reimbursable. However, Wife testified they bought the furniture with a community credit card, not her separate property. We do not reweigh evidence or make credibility determinations on appeal. (See *In re Marriage of Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28, 34 (*Calcaterra*).)

IV. *Retroactive Modification of Support Orders*

Based on the evidence adduced at trial, the family court reduced Husband's combined child and spousal support obligations by about $874 retroactive to November 1, 2016. Husband contends the court erred by not making the modification retroactive to May 2015 (when the court first imposed his support obligations), reasoning the original support calculations were based on an understatement of Wife's income and an overstatement of his. He also contends the court erred by ordering him to contribute toward the children's private school tuition. These contentions lack merit.

Husband asserts that when the family court initially calculated his temporary support obligations in May 2015, Wife understated her earnings by failing to disclose income from a part-time job and rental income from an apartment she owned in France. The record does not substantiate Husband's assertions. Indeed, the record does not include *any* materials regarding the court's May 2015 support proceedings. And although Wife acknowledged at trial that she may have inadvertently omitted certain of her earnings from her income and expense declarations, the court noted that "income and expense declarations regularly include errors," and Wife's oversight involved "only a small amount of money." The family court found Husband's suggestion that Wife deliberately understated her income to be "a dramatic overstatement of the facts." Again, we do not reweigh credibility determinations on appeal. (See *Calcaterra*, *supra*, 132 Cal.App.4th at p. 34.)

Additionally, although the appellate record is devoid of materials directly relating to the May 2015 support proceedings, references to the May 2015 hearing during trial

indicate Mother testified at that hearing that she worked part-time, that she disclosed the French apartment on her income and expense declaration, and that she and Husband had discussed the rental income from the apartment during marriage. Indeed, the family court noted the rental income was "money that he knew about throughout the marriage once she inherited that property." Accordingly, Husband has not shown that the family court abused its discretion with respect to determining Wife's income for purposes of calculating support.

Husband maintains the court also erred by basing his support obligations on an imputed income of $100,000, which he contends was unreasonable in light of the Startup's struggling finances. However, it was Husband who advised the court that he anticipated earning a $100,000 salary from the Startup. The family court stated it appeared Husband was choosing not to pay himself to avoid his support obligations. And even if Husband's failure to pay support was truly the result of the Startup's struggling finances, the court noted that entrepreneurial parents cannot choose to pursue professional endeavors at the expense of their obligations to their children. (See *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1220 ["If [parents] decide they wish to lead a simpler life, change professions or start a business, they may do so, but only when they satisfy their primary responsibility: providing for the adequate and reasonable needs of their children."].) On this record, we find no abuse of discretion.

Finally, Husband contends the family court erred by ordering him to pay half of the children's private school tuition because (1) he cannot afford to, (2) the schooling does not suit the children's needs, and (3) Wife once offered to pay it. None of these

contentions are persuasive. First, as noted, the family court did not err by imputing income to Husband, and he has not shown that contributing toward the children's tuition is unfeasible on his imputed income. Second, the court heard extensive testimony that it was in the children's best interests to remain at their private school, and that Husband had attempted to manipulate the children regarding their preferred schooling. The family court also stated it "didn't find . . . credible" Husband's claim that "he was trying desperately to get [the children] out" of private school during the marriage. Finally, the record shows school-choice was a heavily contested issue, with each party offering to pay various portions of tuition at various times. We find no abuse of discretion in the family court's ultimate balancing of the issue.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.